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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 447

EX PARTE JOHN F. BLASKI; PETER S. PEDERSEN, M-P-H MANUFACTURING CORPORATION, INC., PETER S. PEDERSEN, JR., EDWARD MARTIN, AND PETER S. PEDERSEN, CO-PARTNERS, DOING BUSINESS AS CENTRAL FARM EQUIPMENT COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioners, plaintiffs-petitioners in the Court below, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on June 14, 1957.

OPINIONS OF THE COURTS BELOW.

The opinion of the Court of Appeals for the Fifth Circuit involved herein is not reported, and is printed in Appendix hereto, *infra*, page 1a. The order of the Court of Appeals for the Fifth Circuit denying Petitioner's motion for a rehearing is printed in Appendix hereto, *infra*, page 5a.

The District Court, below, did not hand down an opinion, but the order, transferring this case to the Northern District of Illinois, Eastern Division, and the order overruling Petitioner's motion to vacate the aforementioned transfer order are printed in Appendix hereto, *infra*, at pages 6a and 8a, respectively.

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

The judgment of the Court of Appeals for the Fifth Circuit (Appendix, p. 1a) sought to be reviewed by this petition was entered on June 14, 1957.

The order of the Court of Appeals for the Fifth Circuit (Appendix, p. 5a), denying the petition for rehearing below, was entered July 27, 1957, and this petition is, therefore, timely.

The transfer of this case to the Northern District of Illinois, Eastern Division, has been stayed by an order of the District Court, Northern District of Texas, Dallas Division, to permit the filing of this petition for a writ of certiorari.

The jurisdiction of this Court is invoked under Title 28 U. S. C. A., Sec. 1254(1), and Rule 19(1)(b) of the Revised Rules of this Court in view of:

(1) The conflict in a federal question of great importance, between the decision of the Court of Appeals for the Fifth Circuit and applicable decisions of this Court, namely, the decisions in *Ex parte Collett*, 337 U. S. 55; *Pope* v. *Atlantic Coast Line Railroad Company*, 345 U. S. 379; and *Fourco Glass Company* v. *Transmission Products Corporation*, 353 U. S. 222, 1 L. Ed. 2d 786;

(2) The conflict between the decision of the Court of Appeals for the Fifth Circuit in this case, and the decision of the Court of Appeals for the Ninth Circuit in the case of *Shapiro* v. *Bonanza Hotel Co.* (C. C. A. 9, 1950), 185 F. 2d 777, 780; and

(3) The admitted conflict (Appendix, p. 3a) between the decision of the Court of Appeals for the Fifth Circuit and the decisions of District Courts in six other circuits, namely, the decisions in:

(a) *Hampton Theatres, Inc.* v. *Paramount Film Distributing Corp.* (D. C. D. C. 1950), 90 F. Supp. 645 (Tamm, *J.*);

(b) *Johnson* v. *Harris* (D. C. Tenn. 1953), 112 F. Supp. 338 (Darr, *J.*);

(c) *Sheridan* v. *Pan-American Refining Corp.* (D. C. N. Y. 1954), 123 F. Supp. 81 (Edelstein, *J.*);

(d) *General Electric Co.* v. *Central Transit Warehouse Co.* (D. C. Mo. 1955), 127 F. Supp. 817 (Whittaker, *J.*);

(e) *Mitchell* v. *Gundlach* (D. C. Md. 1955), 136 F. Supp. 169 (Chesnut, *J.*);

(f) *Felchlin* v. *American Smelting & Refining Co.* (D. C. Calif. 1955), 136 F. Supp. 577 (Jertberg, *J.*).

QUESTION PRESENTED.

The important federal question presented herein is: Does a District Court, in a district in which an action for patent infringement is properly brought under Title 28 U. S. C. A. Sec. 1400(b), have the power, under Title 28 U. S. C. A. Sec. 1404(a), upon motion of the defendants and over the objections of the plaintiffs, to transfer the cause to another district in another circuit where the action could not originally have been brought, in which latter district none of the defendants reside, and none of the defendants have committed acts of infringement or have a regular and established place of business?

STATUTES INVOLVED.

The two statutes here involved are Title 28 U. S. C. A. Secs. 1400(b) and 1404(a), which read as follows:

Title 28 U. S. C. A. Sec. 1400. **Patents and copyrights**

(b) Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.

Title 28 U. S. C. A. Sec. 1404. **Change of venue**

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

STATEMENT OF THE CASE.

This petition relates to a cause of action for paten infringement brought in the United States District Cour for the Northern District of Texas, Dallas Division, o March 1, 1957, by the petitioners, John F. Blaski *et al* as plaintiffs, against respondents, R. P. Howell, Jr. an Lifetime Metal Building Co., a Texas corporation, as de fendants. All of the defendants in the cause of actio reside and are doing business within the Northern Distric of Texas, Dallas Division, while no one of the defendant either resides, or is doing business, within the Northern District of Illinois. In their complaint, the plaintiff alleged that certain acts of the defendants infringed tw United States Letters Patent issued to John F. Blask and identified as Patent Nos. 2,436,543 and 2,526,323. Th complaint further alleged that said acts of patent infringe ment were committed by the defendants in the Northern District of Texas, Dallas Division. No acts of infringe ment have been committed by any of the defendants in th Northern District of Illinois, within the knowledge o belief of petitioners herein.

Hence, it will be seen that venue was proper in th Northern District of Texas, and would not have bee proper in the Northern District of Illinois under Title 28 U. S. C. A., Sec. 1400(b).

The defendants-respondents filed their answer to th aforementioned complaint on March 22, 1957 and the actio was set for trial on May 31, 1957 as a non-jury case befor The Honorable William H. Atwell. Thereafter, on Marc 28, 1957, the defendants-respondents filed a jury demand which was opposed by the plaintiffs, and because of th jury demand the action was then assigned to the jury cal endar before The Honorable T. Whitfield Davidson. O March 29, 1957, plaintiffs-petitioners filed a motion t

strike defendants' demand for a jury and noticed the matter for hearing on Monday, April 8, 1957. Prior to the hearing on plaintiffs-petitioners' motion to strike defendants' demand for a jury, the defendants-respondents submitted a second motion, requesting transfer of the cause of action to the Northern District of Illinois, Eastern Division, under Title 28, U. S. C. A., Sec. 1404(a), stating in their motion that defendants waived lack of venue in the Northern District of Illinois. The plaintiffs-petitioners opposed this second motion of the defendants-respondents and oral arguments were had with respect to this matter before The Honorable T. Whitfield Davidson on April 11, 1957. On April 16, 1957, Judge Davidson entered an order directing that for the convenience of parties and witnesses, in the interest of justice the aforementioned civil action be transferred to the United States District Court for the Northern District of Illinois, Eastern Division.

Immediately thereafter, on April 17, 1957, the plaintiffs-petitioners filed a motion in the United States District Court, Northern District of Texas, Dallas Division, requesting that the order to transfer be vacated. On April 22, 1957, the aforementioned District Court overruled the plaintiffs-petitioners' motion to vacate and thereafter, on May 18, 1957, the plaintiffs-petitioners filed a motion for leave to file a petition for a writ of mandamus in the United States Court of Appeals for the Fifth Circuit requesting that Court to issue an order to show cause why a writ of mandamus should not be issued against Judge Davidson nullifying the aforementioned order of April 16, 1957, transferring the aforementioned civil action to the Northern District of Illinois, Eastern Division.

In an opinion dated June 14, 1957 (Appendix, p. 1a) the Court of Appeals for the Fifth Circuit handed down a decision denying plaintiffs-petitioners' motion for leave

to file a petition for a writ of mandamus, although specifically acknowledging (Appendix, p. 3a) that its decision was in conflict with a number of district court decisions. The plaintiffs-petitioners thereupon filed a petition for rehearing in the Court of Appeals below. The defendants-respondents did not oppose or contest the petition for rehearing. However, on July 27, 1957, the Court of Appeals below issued an order denying the petition for rehearing (Appendix, p. 5a).

REASONS FOR GRANTING THE WRIT.

1. The decision of the Court below is in conflict with the applicable decisions of this Court in *Ex parte Collett*, 337 U. S. 55; *Pope* v. *Atlantic Coast Line Railroad Company*, 345 U. S. 379; and *Fourco Glass Company* v. *Transmission Products Corporation*, 353 U. S. 222, 1 L. Ed. 786; and is directly contrary to the express provisions of Sections 1400(b) and 1404(a), Title 28, U. S. C. A., which are the controlling statutes in this case.

This is a patent infringement action, and, therefore, Section 1400(b), Title 28, U. S. C. A. is controlling as to *original* venue with respect thereto. This section specifically states *where* such an action may be brought, providing as follows:

> "Any civil action for patent infringement *may be brought* in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business."

Section 1404(a), Title 28, U. S. C. A. is controlling as to any *change* of venue with respect to this action and provides that:

> "* * * a district court may transfer any civil action

to any other district or division *where it might have been brought.*"*

It is to be noted that the "may be brought" language is identical (except for tense) in both of the aforementioned statutes.

Prior to the adoption of Section 1404(a), Title 28, U. S. C. A., it was well established law, under the doctrine of *forum non conveniens*, that:

> "In *all* cases in which the doctrine of *forum non conveniens*" came into play, it presupposed "at least two forums in which the defendant is amenable to process." *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501.

At least twice since the adoption of Section 1404(a), Title 28, U. S. C. A., this Court has recognized that, under that section of the statute, just as under the doctrine of *forum non conveniens*, a district court does not have the power to transfer a civil action to another forum unless the civil action could have been properly brought in that other forum originally.

Thus, in the case of *Ex parte Collett*, 337 U. S. 55, this Court recognized that any change of venue under Section 1404(a) is in accordance with the doctrine of *forum non conveniens;* that Section 1404(a) was carefully considered by Congress and is clear and unambiguous; and that the Congressional recognition of the doctrine of *forum non conveniens* afforded by Section 1404(a) applies to *all* civil actions, including those actions arising under special venue statutes, such as, for example, suits for patent infringement. In that case, this Court stated as follows at pages 58, 65, 68, 69 and 71:

> "The reviser's notes, which accompany each section of the Code, here read as follows: 'Sub-section (a)

* Emphasis added throughout this petition unless otherwise indicated.

was drafted *in accordance with the doctrine of forum non conveniens*, permitting transfer to a more convenient forum, even though the venue is proper.' "

. . . . . .

"The Court below relied on the language of Sec. 1404(a), *supra*, which is regarded as *'unambiguous, direct, clear.' We agree.*"

. . . . . .

"*This was scarcely hasty, ill-considered legislation. To the contrary, it received close and prolonged study.* Five years of Congressional attention supports the Code. And from the start, Congress obtained the most eminent expert assistance available."

. . . . . .

"The initial appearance of Sec. 1404(a) was in the Second Draft of the Code, adopted by the meeting of May, 1945. Its text has remained unchanged. It was accompanied by a reviser's note, which recited that 'Subsection (a) is new. *It was drafted in accordance with a memorandum* of May 7, 1945, from the author of Moore's Federal Practice, *stating that recognition should be given the doctrine of forum non conveniens.* [29]"

. . . . . .

"From the start, Sec. 1404(a) remained the same, and the reference in the note to a Federal Employers' Liability Act case as showing the need for permitting *the application of forum non conveniens* remained unchanged. Now to hold that Congress did not appreciate what it was enacting in that section would *defy* the legislative history."

It will be noted that the last two sentences quoted above apply equally as well to suits for patent infringement which were also specifically referred to in the reviser's note (see footnote 29).

The footnote "29" indicated above stated:

"There is no doubt as to the meaning of Sec. 1404(a) in the mind of the author of the memorandum. See

3 Moore's Federal Practice 2141, 2d ed, stating that the Code 'provides for a transfer * * * of *any* action to a *proper* and more convenient forum' (italics in original),* with a footnote (107) citing Sec. 1404(a) and declaring that 'ANY *action* in Sec. 1404(a) includes suits subject to *special venue* statutes, as *suits for patent infringement* and suits under the Federal Employers' Liability Act; as well as actions subject to the general venue statute.'"

In the later case of *Pope* v. *Atlantic Coast Line Railroad Company*, 345 U. S. 379, this Court cited with approval the abovementioned case of *Ex parte Collett*, and, with respect to Section 1404(a) stated as follows, at page 384:

"* * * its *limited* purpose is to authorize, under certain circumstances, the transfer of a civil action from one federal forum to another federal forum *in which the action 'might have been brought'*."

It is submitted that the decision of the Court of Appeals below, permitting transfer to a district in which the action could *not* have been brought, is in conflict with these decisions of this Court, and is directly contrary to the express provisions of the applicable statutes, namely Title 28, U. S. C. A. Sections 1400(b) and 1404(a).

This Court has recently held in the case of *Fourco Glass Company* v. *Transmission Products Corporation*, (April 29, 1957) 353 U. S. 222, 1 L. ed. 2d 786, that Section 1400 (b) Title 28, U. S. C. A. is the sole and exclusive statutory provision governing venue in patent infringement cases, stating in part as follows at page 789:

"We hold that 28 U. S. C. A. Sec. 1400(b) is the *sole and exclusive* provision controlling venue in patent infringement actions, * * *"

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* This parenthetical insert, appearing in the original decision, applies only to the word "any", thereabove.

Section 1400(b), Title 28, U. S. C. A. provides *only* that a patent infringement action "*may be brought*" in the judicial district:

(1) "where the defendant resides, or"

(2) "where the defendant has committed acts of infringement and has a regular and established place of business."

None of the defendants resides in, has a regular and established place of business in, or, to petitioners' knowledge, has committed any acts of infringement in, the Northern District of Illinois. Hence this action could not have been brought, and may not now be brought, in the Northern District of Illinois under Section 1400(b), which clearly provides where the action may be brought, and which this Court has recently held is the *sole and exclusive* provision controlling venue in patent infringement actions.

By its decision in this case, the Court of Appeals below has ruled that the words "might have been brought" in the venue statute, Title 28 U. S. C. A. Sec. 1404(a) are meaningless, and that this section of the statute should be read as though those words were not contained therein because, in the Court of Appeals' opinion, such a transfer may be made to any other District Court, whether or not the action could have been *properly* brought in that district. This ignores the fact that:

(1) This Court has ruled that the language of Section 1404(a) is "unambiguous, direct, clear", and that it "'provides for a transfer * * * of any action to a *proper* and more convenient forum'", *Ex parte Collett*, 337 U. S. 55, *infra;*

(2) The "might have been brought" provision of the change of venue statute, Title 28 U. S. C. A. Sec. 1404(a) is the same identical provision (except that it is a different tense) as the "may be brought" provision of the patent statute under which this action was brought, Title 28 U. S. C. A. Sec. 1400(b), and that

this Court has ruled that under the patent statute a patent infringement action "may be brought" *only* in a district where a defendant resides, or where the defendant has a regular and established place of business, as specifically provided in Sec. 1400(b), *Fourco Glass Company* v. *Transmission Products Corporation*, 353 U. S. 222, *supra*; and

(3) The *existence* of the power of a District Court to transfer an action to another district is *entirely jurisdictional*, and may *only* be exercised in strict accordance with the *express provisions of the statutory grant* (*Felchlin* v. *American Smelting and Refining Company*, D. C. S. D. Calif., N. D., 136 F. Supp. 577, 580, 581), so that a District Court may not completely devitalize a statute by altogether ignoring an express limitation as to which districts an action may be transferred to by holding that such an action may be transferred to *any* district on the reasoning that the action might have been *improperly* filed in any district.

2. Also, this holding is in conflict with the decision of the Court of Appeals for the Ninth Circuit in the case of *Shapiro* v. *Bonanza Hotel Co.*, 185 F. 2d 777, which the Court of Appeals for the Fifth Circuit previously expressly recognized as proper, contrary to the present decision. In the *Shapiro* case the Court of Appeals for the Ninth Circuit stated as follows, at page 780:

> "Prior to the adoption of Sec. 1404(a) the Supreme Court[7] significantly stated that *the doctrine of forum non conveniens 'presupposes at least two forums in which the defendant is amenable to process'*. We are persuaded that Congress did not intend, by the use of the one word 'brought', to change this rule. *We adhere to the view that use of the word 'brought' presupposes jurisdiction over the defendant which is to be obtained only by and through conformance with the requirements of Rule 4(f).*"

The footnote "(7)" indicated above stated:

> "*Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 67 S. Ct. 839, 91 L. Ed. 1055; see also *Wilson* v. *Seas Shipping*

Co., Inc., D. C., 78 F. Supp. 464, wherein the court refused to transfer an action under the *forum non conveniens* doctrine made by the defendant *where the defendant had not shown that he was amenable to process in the district.*"

Quite significantly, the specific conflict above identified is, in actuality, a mere isolated instance of widespread conflict which exists in the federal judicial system with respect to the question presented by this petition.

It is interesting to note that previous to the present decision from which this petition is taken, in the case of *Blackman* v. *Guerre, et al.* (C. C. A. 5, 1951), 190 F. 2d 427 the Court below expressly recognized that the Court of Appeals for the Ninth Circuit in the *Shapiro* case correctly stated the law, and that the *Shapiro* holding was contrary to the present holding of the Court of Appeals for the Fifth Circuit, stating as follows, at page 429:

> "Transfer under those sections is *limited* to districts where the suit could be originally brought: *Putnam* v. *Ickes*, 64 App. D. C. 339, 78 F. 2d 223. Compare *Foster-Milburn Co.* v. *Knight*, 2 Cir., 181 F. 2d 949; *Shapiro* v. *Bonanza Hotel Co.*, 9 Cir., 185 F. 2d 777."

Curiously enough, however, the court below, in denying the petitioner's motion, refused to abide by and follow this previous recognition of this limitation of a court's power to transfer, which it had previously clearly pointed out in the *Blackman* v. *Guerre, et al.* case.

3. The opinion of the Court below, as expressly admitted in its opinion (Appendix, p. 3a), is in conflict with the decisions of District Courts in six different circuits.

One of the decisions with which the opinion below is admittedly in conflict is the carefully reasoned opinion of then District Judge Whittaker in the case of *General Electric Company* v. *Central Transit Warehouse Company, et al.* (W. D. Mo. W. D., 1955), 127 F. Supp. 817. In that

case Judge Whittaker discussed at some length the meaning of "might have been brought" in Sec. 1404(a) in ruling on a motion of *defendant* for change of venue (granted because by plaintiff's complaint the defendants were "doing business" in the forum to which the transfer was requested). In ruling on the meaning of "might have been brought" in Sec. 1404(a) Judge Whittaker stated as follows, at pages 825, 826 and 827 (Emphasis the court's):

> "We recognize of course, that venue can be waived. So can jurisdiction over the person be waived. But does such a waiver of either or both—made *after* an action has been 'commenced' (by the mere filing of a complaint with the clerk *in any district*, see Fed. Rules Civ. Proc. Rule 3, 28 U. S. C. A.)—establish that the action 'might have been brought' there, in the sense of that phrase as used in Section 1404(a), Title 28 U. S. C. A.? If it does, what, if any, meaning is left to the phrase 'where it might have been brought', as adopted by Congress and used in the statute? Would not such construction permit transfer of the action to *any district desired by the moving defendants*, though they, or some of them, could not have been served with process there, and no statutory venue existed there and the action could not have been *maintained* there, without their intentional waiver of venue and entry of general appearance? I think no such treatment can be given to that phrase in the statute. It, says Judge Learned Hand, 'presupposes at least two forums in which the defendant is amenable to process'. *Foster-Milburn Co.* v. *Knight*, 2 Cir., 181 F. 2d 949, 952.
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> . . . . . .
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> "We adhere to our original conclusion that a district court is without power to transfer a cause, under Section 1404(a), Title 28 U. S. C. A., to a district without statutory venue and wherein service of process could not have been had and involuntary personal jurisdiction acquired, because, under these circumstances, the action could not have been 'brought' in that district."

At least five of the six cases admittedly in conflict with the present holding of this Court are cases wherein the defendant brought the motion to transfer, and all six of the cases support the plaintiffs' position in this case.

Thus, in the case of *Hampton Theatre, Inc.* v. *Paramount Film Distributing Corporation, et al.*, 90 F. Supp. 645 (D. C., D. C., 1950), it was the defendants who moved to transfer the case to a forum in which they were neither "transacting" nor "doing business" as required by the venue statute under which the action was brought. In denying the *defendants'* motion, the Court (Tamm, J.) stated as follows, at page 647:

> **"However, this Court is of the opinion that the defendants are not 'transacting' or 'doing' business in Virginia within the provisions of the statute under which this action is brought and that consequently the action could not have been maintained in Virginia. The court is of the further opinion that there could be no valid service of process in Virginia. *Since the action could not be maintained in Virginia, the Court may not under Sec. 1404(a) of T. 28 of the United States Code Annotated transfer the action there.*"**

In the case of *Johnson* v. *Harris* (D. C., E. D. Tenn. S. D., 1953), 112 F. Supp. 338, in denying the *defendant's* motion to transfer the case to a district in which there would not have been proper venue originally, the Court (Darr, J.) stated as follows at page 341:

> "In fact, the statute, Section 1404(a), Title 28, U. S. C. A., providing for transfer of a case *contemplates statutory venue and not consent venue.*"

In the case of *Sheridan, et al.* v. *Pan-American Refining Corp., et al.* (D. C., S. D. N. Y., 1954), 123 F. Supp. 81, proper statutory venue did not originally exist for either defendant in the forum to which the transfer was requested. In denying the motion of *both defendants* to

transfer the case to this latter forum, the Court (Edelestein, J.) stated as follows, at page 82:

> *"It does not, therefore, appear that this suit could have been brought* in the District Court for the Southern District of Texas, and *accordingly the motion will be denied."*

In the case of *Felchlin* v. *American Smelting and Refining Company*, 136 F. Supp. 577 (D. S. S. D. Calif., N. D., 1955), in denying a motion of *defendant* for a change of venue to a forum where the action could not have been brought originally, the Court (Jertberg, J.) stated as follows, at pages 580 and 581:

> "The plaintiff could not have 'brought' the action there originally. *This is not a question of venue or jurisdiction that can be waived by the parties. It is a question of the power of a Court to transfer the action.* This is a case similar to *United States* v. *11 Cases, etc.*, D. C., 94 F. Supp. 925, 927, in which Judge Fee, presently a member of the Ninth Circuit Court of Appeals, said that *the existence of the power of transfer is jurisdictional, and may only be exercised in strict accordance with the statutory grant.*
>
> • • • • •
>
> "A District Court is a separate entity. No District Court has jurisdiction crossing a state line. *By virtue of these limitations, the transfer of any cause from one district to another is a question of power. No District Court has such inherent authority. There must be an express statutory grant as a condition precedent to the initiation of the transfer, and every essential factor must be present to confer jurisdiction on the court to which the case is sent.* If this action could have been brought originally in the Texas courts, the transfer to Texas would then be possible, but since the action is one based on diversity of citizenship, the law of Texas would apply. *United States* v. *11 Cases, etc.*, 94 F. Supp. 925. Statutory authority to transfer an action to a district or division 'where

it might have been brought' certainly does not authorize transfer to a district where the action might not have been brought. *General Electric Co.* v. *Central Transit Warehouse Co.*, 127 F. Supp. 817. The *phrase* 'might have been brought' *means* the place where the plaintiff had the *right* to institute the suit originally. *Greve* v. *Gibraltar Enterprises*, D. C. N. M. 85 F. Supp. 410, 412.

The case of *Mitchell* v. *Gundlech* (D. C. Md., 1955), 136 F. Supp. 169, referred to by the Court below in its opinion as being in conflict with its holding is distinguishable on its facts in that, in that case, it was the plaintiff bringing the motion to transfer. However, in its opinion in the *Mitchell* case, the Court (Chesnut, J.) set forth a very comprehensive discussion of Sec. 1404(a), which supports the plaintiff in the present action, and in which, incidentally, it stated (pages 174 and 175) that, based on the *Blackmar* v. *Guerre* decision of the Court of Appeals for the Fifth Circuit Court, it was the opinion of the Court of Appeals below that transfer under Sec. 1404(a) could be made *only* to a forum which would have had *original statutory venue* and jurisdiction. That is a correct statement of the law, and is contrary to the present holding of the Court below.

CONCLUSION.

For the reasons stated, and under the authorities cited, it is submitted that the decision of the Court of Appeals for the Fifth Circuit denying petitioners motion for leave to file a petition for mandamus is in error, and that this petition for a writ of certiorari to that court to review its action in so holding is well founded in fact and in law and should be granted.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS

For the Fifth Circuit.

No. 16686.

EX PARTE JOHN F. BLASKI, ET AL.

MOTION FOR LEAVE TO FILE PETITION FOR A WRIT OF MANDAMUS.

(June 14, 1957.)

Before RIVES, JONES and BROWN, Circuit Judges.

JONES, Circuit Judge: The movants here, who were plaintiffs in the district court, have their residence in the Northern District of Illinois. They instituted suit in the district court for the Northern District of Texas against several defendants, all of whom reside in the Northern District of Texas. The complaint charged patent infringement. The defendants made a motion to transfer the cause, pursuant to 28 U.S.C.A. §1404(a), to the Northern District of Illinois. In their motion the defendants stated that their witnesses were much closer to the court in Illinois than to the court in Texas. They also stated, among other averments, that there is pending in the district court for the Northern District of Illinois a consolidated action in which the plaintiffs in the Texas suit were charging infringement of the same patent as was involved in the suit in Texas. It was shown that in the action in the Northern District of Illinois much pre-trial information and evidence had been developed which

would be relevant in the case commenced in the Northern District of Texas. The defendants waived their right to be sued in the Northern District of Texas and consented to the consolidation of the action with the cause pending in Illinois. An order was entered transferring the cause to the Northern District of Illinois. The plaintiffs, by motion, unsuccessfully sought from the district court an order vacating the order of transfer. The plaintiffs, John P. Blaski and others, have filed in this court their motion for leave to file a petition for a writ of mandamus to require the district court to vacate and set aside the order of transfer. This motion we now consider.

The authority for ordering the transfer is the statutory enactment which provides:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C.A., §1404(a).

Congress has prescribed venue in patent infringement cases in this language:

> "Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business." 28 U.S.C.A. §1400(b).

The plaintiffs say that none of the defendants reside in Illinois and have not committed in Illinois any acts of infringement, that process issued in Illinois could not have been served on the defendants and therefore the action could not "have been brought" in the district to which it was transferred. The attempted waiver, the plaintiffs say, is ineffectual.

It has been held in this Circuit that unless the district court has failed correctly to construe and apply the statute, consider the relevant factors incident to a motion

to transfer, or has clearly abused its discretion, a Court of Appeals should not entertain applications for mandamus to enter or vacate orders of transfer under §1404(a). *Ex Parte Chas. Pfizer & Co.*, 5 Cir. 1955, 225 F. 2d 720; *Ex Parte Pharma-Craft Corporation*, 5 Cir. 1956, 236 F. 2d 911. Cf. *Atlantic Coast Line R. Co.* v. *Davis*, 5 Cir. 1950, 185 F. 2d 766. In supporting the position that the district court erroneously construed and applied the statute in the determination, implicit in its order of transfer, that the action might have been brought in the Northern District of Illinois, the plaintiff-movants cite *Blackman* v. *Guerre*, 5 Cir. 1951, 190 F. 2d 427. In that opinion it was said with respect to the cause there decided that the action could not have been transferred under §1404(a) to the District of Columbia because a defendant was a resident of Louisiana. An examination of the opinion will show that the statement of the court was neither necessary to the decision nor upon a question involved in the appeal. The decision is not a precedent on the question we have before us. The Supreme Court affirmed *Blackman* v. *Guerre* without considering the point with which we are here concerned. *Blackman* v. *Guerre*, 342 U. S. 512, 72 S. Ct. 410, 96 L. Ed. 534.

There are a number of district court decisions holding that even though a defendant moves for a transfer, the court has no power to grant the motion where the defendants are not subject to service in the transferee district. *Hampton Theatres, Inc.* v. *Paramount Film Distributing Corp.*, D.C.D.C. 1950, 90 F. Supp. 645; *Johnson* v. *Harris*, D.C. Tenn. 1953, 112 F. Supp. 338; *Sheridan* v. *Pan-American Refining Corp.*, D.C.N.Y. 1954, 123 F. Supp. 81; *General Electric Co.* v. *Central Transit Warehouse Co.*, D.C.Mo. 1955, 127 F. Supp. 817; *Mitchell* v. *Gundlach*, D.C.Md. 1955, 136 F. Supp. 169; *Felchlin* v. *American Smelting & Refining Co.*, D.C.Calif. 1955, 136 F. Supp.

577. The rule which to us seems the better reasoned and which has been adopted by the majority of the courts, permits the transfer upon the motion or with the consent of the defendants even though they could not have been served with the process of the transferee court. *Paramount Pictures, Inc.* v. *Rodney*, 3 Cir. 1951, 186 F. 2d 111, cert. den. 340 U. S. 953, 71 S. Ct. 572, 95 L. Ed. 687; *Anthony* v. *Kaufman*, 2d Cir. 1951, 193 F. 2d 85, cert. den. 342 U. S. 955, 72 S. Ct. 629, 96 L. Ed. 710; *In re Josephson*, 1 Cir. 1954, 218 F. 2d 174; *Torres* v. *Walsh*, 2nd Cir. 1955, 221 F. 2d 319. A number of district court decisions arrive at like results. The purposes for which §1404(a) was enacted would be unduly circumscribed if a transfer could not be made "in the interest of justice" to a district where the defendants not only waive venue but to which they seek the transfer. The interpretation of the phrase "where it might have been brought", as used in 28 U.S. C.A. §1404(a), is discussed at length by Chief Judge Magruder of the First Circuit in the case of *In re Josephson, supra*. We need not labor the point here.

The district court was empowered by the statute to make the transfer. It is not shown that the district court misconstrued or misapplied the statute or failed to consider all pertinent facts. No abuse of discretion is shown. The rule announced in *Ex Parte Chas. Pfizer & Co., supra*, is applicable. The motion for leave to file a petition for a writ of mandamus is

DENIED.

ORDER DENYING REHEARING.

Extract from the Minutes of July 27, 1957.

No. 16686,

IN RE:

JOHN F. BLASKI, ET AL.,

PRAYING FOR A WRIT OF MANDAMUS.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

IN THE DISTRICT COURT OF THE UNITED STATES
for the Northern District of Texas
Dallas Division.

JOHN F. BLASKI, PETER S. PEDERSEN, M-P-H MANUFACTURING CORPORATION, INC., PETER S. PEDERSEN, JR., EDWARD MARTIN, and PETER S. PEDERSEN, Co-Partners, doing business as Central Farm Equipment Company,
Plaintiffs,
vs.
R. P. HOWELL, JR. and LIFETIME METAL BUILDING COMPANY,
Defendants.
} Civil Action No. 7607

ORDER OF TRANSFER.

The defendants having moved for an order transferring the venue of this cause to the United States District Court for the Northern District of Illinois, Eastern Division, and said motion having duly come on to be heard on April 11, 1957, and the Court having heard the argument of counsel and being fully advised, and it appearing to the Court that defendants' motion should be granted for the convenience of parties and witnesses in the interest of justice, it is

ORDERED, that this action be transferred from the United States District Court for the Northern District of Texas, Dallas Division, and it is further

ORDERED, that the Clerk of this United States District

Court for the Northern District of Texas, be and hereby is directed to transfer all records and papers in this action, together with the deposit made by the plaintiffs, to the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, together with a certified copy of this order.

Dated April 16, 1957.

.....

United States District Judge.

IN THE UNITED STATES DISTRICT COURT

Northern District of Texas

Dallas Division.

JOHN F. BLASKI, ET AL
vs.
R. P. HOWELL, JR., ET AL } Civil Action No. 7007

ORDER OVERRULING MOTION TO VACATE.

On this the 22nd day of April, 1957, came on to be heard the motion of plaintiffs to vacate the order heretofore entered by this court changing venue of this cause to the United States District Court for the Northern District of Illinois, Eastern Division, and the court having heard and considered such motion and being of the opinion that same should be overruled;

It is, therefore, ordered that the motion of plaintiffs herein to vacate this court's order changing venue to the United States District Court for the Northern District of Illinois, Eastern Division be and the same is hereby overruled and denied.

/s/
United States District Judge.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 447

EX PARTE JOHN F. BLASKI, PETER S. PEDERSEN, M-P-H MANUFACTURING CORPORATION, INC., PETER S. PEDERSEN, JR., EDWARD MARTIN, AND PETER S. PEDERSEN, CO-PARTNERS, DOING BUSINESS AS CENTRAL FARM EQUIPMENT COMPANY.

REPLY BRIEF FOR PETITIONER.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 447.

EX PARTE JOHN F. BLASKI, PETER S. PEDERSEN, M-P-H MANUFACTURING CORPORATION, INC., PETER S. PEDERSEN, JR., EDWARD MARTIN, AND PETER S. PEDERSEN, CO-PARTNERS, DOING BUSINESS AS CENTRAL FARM EQUIPMENT COMPANY.

REPLY BRIEF FOR PETITIONER.

I.

THE PRESENT CASE MEETS THE IMPORTANT PREREQUISITES FOR REVIEW BY THIS COURT—RESPONDENTS ADVANCE NO VALID REASON FOR DENIAL OF THE PETITION.

A. Respondents Seek to Induce This Court to Ignore the Basic Issues Involved in This Case and the Fundamental Reasons for Granting the Petition.

In their brief, Respondents seek to have this Court ignore the fact that Petitioners filed the present patent suit in a District Court which had original jurisdiction, and that, over the objection of the Petitioners, the District Court ordered transfer of the suit to a District which would not have had original jurisdiction. Petitioners contend that the District Court did not have the *power* to order such a transfer.

This is not a case wherein a plaintiff has brought an action in a District wherein the Court did not have proper original jurisdiction, and the defendant entered a general appearance and waived its objection to venue. It is a case wherein the plaintiff brought the action in a District wherein venue was proper and the District Court, over the objection of the plaintiff, *transferred* the case to a District wherein venue was not proper.

As was said by Judge Whittaker in the case of *General Electric Company* v. *Central Transit Warehouse Company, et al.* (W. D. Mo. W. D., 1955), 127 F. Supp. 817, 827:

> "We adhere to our original conclusion that a district court is *without power** to transfer a cause, under Section 1404(a), Title 28, U. S. C. A., *to a district without statutory venue* and wherein service of process could not have been had and involuntary personal jurisdiction acquired, because, under these circumstances, the action could not have been 'brought' in that district."

Also, as was stated by Judge Jertberg in the case of *Felchlin* v. *American Smelting and Refining Company*, 136 F. Supp. 577 (D. S. S. D. Calif., N. D., 1955):

> "*A District Court is a separate entity. No District Court has jurisdiction crossing a state line.* By virtue of these limitations, the transfer of any cause from one district to another is a question of *power. No District Court has such inherent authority. There must be an express statutory grant as a condition precedent to the initiation of the transfer, and every essential factor must be present to confer jurisdiction on the court to which the case is sent.*"
>
> . . . . . .
>
> "Statutory authority to transfer an action to a district or division *'where it might have been brought'* certainly does not authorize transfer to a district where the action might *not* have been brought.' *Gen-*

* Emphasis added throughout, unless otherwise indicated.

era Electric Co. v. *Central Transit Warehouse Co.*, 127 F. Supp. 817. The phrase 'might have been brought' means the place where the plaintiff had the *right* to *institute* the suit originally. *Grève* v. *Gibraltar Enterprises*, D. C. N. M. 85 F. Supp. 410, 412."

The practical significance of the issue involved far transcends the present case, as is compellingly illustrated by the widespread conflict in the lower Federal Courts, which conflict is specifically admitted by the Court of Appeals below (Appendix to Petition for Certiorari, p. 3a). In the interests of uniform and orderly procedure in patent litigation, this Court should grant certiorari to resolve the confusion arising from the application by the lower Federal Courts of squarely conflicting interpretations of Section 1404(a), Title 28 U. S. C. A.

B. There is Widespread Conflict in the Lower Federal Courts Concerning the Issue Involved.

The petition demonstrates that widespread, direct and irreconcilable conflict exists in the lower Federal Courts concerning the proper interpretation of Section 1404(a), Title 28 U. S. C. A. The existence of this conflict is specifically admitted by the Court of Appeals, below, in its opinion (Appendix to Petition for Certiorari, p. 3a).

The brief of Respondents (p. 2, Para. 3) points up rather than negatives this widespread conflict on an important basic question, which should be settled once and for all.

II.

THE QUESTION PRESENTED IS ACCURATELY STATED IN THE PETITION.

It is self-evident that the question presented is accurately stated in the petition.

The Respondents' attempt in their alleged restatement of the question (Respondents' Brief, p. 3), to treat the issue involved herein as though it were the same thing as if the plaintiff had originally filed the suit in a District wherein venue could not be had, and the defendant had filed a general appearance and waived venue, is without merit.

This is a case involving a *transfer* of an action from one District to another under Section 1404(a), Ttle 28 U. S. C. A., which is the only statutory grant of power by which a District Court may transfer a case of this type to another District. This Court itself, in the case of *Ex parte Collett*, 337 U. S. 55, in footnote "29", on page 69, adopted the language of 3 Moore's Federal Practice 2141 2d ed., which stated that this section

> "provides for a transfer * * * of any action to a *proper* and more convenient forum."

Contrary to the Respondents' contentions, this does *not* mean that this section of the Statute provides for a transfer of an action to an *improper* forum.

III.

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE DECISIONS OF THIS COURT CITED IN THE PETITION FOR CERTIORARI.

The attempt of the Respondents (pp. 2, 4 and 5) to minimize the conflict between the decision of the Court below with the decisions of this Court is in error.

Contrary to the Respondents' contentions, this Court in the case of *Ex parte Collett*, 337 U. S. 55, specifically stated that Section 1404(a), Title 28 U. S. C. A., "was drafted *in accordance with the doctrine of forum non conveniens.*" The doctrine of *forum non conveniens presupposed* "*at least two* forums in which the defendant is amenable to process," *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501. The Court below has held that this section is not so limited and, therefore, is in direct conflict with the opinion of this Court in the case of *Ex parte Collett*.

Also, contrary to Respondents' contention, the decision of the court below is in direct conflict with the opinion of this Court in the case of *Pope* v. *Atlantic Coast Line Railroad Company*, 345 U. S. 379, wherein this Court cited with approval the aforementioned case of *Ex parte Collett* and, at page 83, stated as follows with respect to Section 1404(a):

> "• • • its *limited purpose* is to authorize, under certain circumstances, the transfer of a civil action from one federal forum to another federal forum in which the action '*might have been brought*'."

It will be remembered that in the case of *Ex parte Collett*, this Court stated that Section 1404(a) provides for a transfer to a *proper* forum. Hence, it is apparent that when, in the case of *Pope* v. *Atlantic Coast Line Railroad Company*, this Court spoke of a "forum in which the ac-

tion "'might have been brought'," it was speaking of a *proper* forum and *not* an improper forum. The court below, in its opinion, has interpreted Section 1404(a) as permitting transfer to an improper forum and hence, is in direct conflict with the opinion of this Court in the *Pope* v. *Atlantic Coast Line Railroad Company* case.

In addition, Respondents' attempt (Respondents' Brief, p. 5) to minimize the holding of this Court in the case of *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U. S. 222 (April 29, 1957), and the Respondents' statement that the case "*merely* held that a patent infringement suit was properly dismissed for lack of venue upon defendant's motion" is in error. That case also *held*, that Section 1400(b) is the sole and exclusive statutory provision controlling venue in patent infringement actions, this Court specifically stating in its opinion at page 789 as follows:

> "We *hold* that 28 U. S. C. A. Sec. 1400(b) is the *sole and exclusive* provision controlling venue in patent infringement actions. * * *"

Section 1400(b) sets forth the requirements for the District in which a patent infringement action "*may be brought.*" The Northern District of Illinois does not meet those requirements in the present action and hence is not a "*proper*" forum within the meaning of this Court's opinion in the aforementioned *Ex parte Collett* case. The court below has held, in effect, that the "*may be brought*" language of Section 1400(b) is meaningless and, therefore, its opinion is in direct conflict with the opinion of this Court in the *Fourco Glass Co.* case wherein the court specifically held that Section 1400(b) is the *sole exclusive* provision *controlling* venue in patent infringement actions.

IV.

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE DECISION OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT IN THE CASE OF SHAPIRO v. BONANZA HOTEL CO., 185 F. 2d 777.

Respondents' attempt (Respondents' Brief, p. 7) to induce this Court to believe that petitioners have misconstrued the holding of the Court of Appeals for the Ninth Circuit in *Shapiro* v. *Bonanza Hotel Co.*, 185 F. 2d 777, is in error.

In the *Shapiro* case, the Court of Appeals for the Ninth Circuit was ruling on the meaning of Section 1404(a), Title 28 U. S. C. A., and *held* that Congress, by using the word "brought" in Section 1404(a), had not meant to change the rule, as previously laid down by the doctrine of *forum non conveniens*, that the right to transfer presupposes at least two forums in which the defendant is amenable to process, and *held* that under Section 1404(a), in order to transfer a case from one District to another, the case must have been able to have been originally *properly* brought in the transferee district. The Court of Appeals below has held that Section 1404(a) is not so limited and, therefore, is in direct conflict with the Court of Appeals for the Ninth Circuit in the *Shapiro* case.

CONCLUSION.

It is submitted that the petition for certiorari clearly presents an important question of statute interpretation on which there is admitted, widespread conflict in the lower Federal Courts. Also, the Court of Appeals below handed down a decision which is in conflict with applicable decisions of this Court, and with a decision of the Court of Appeals for the Ninth Circuit, and which is admittedly in conflict with the decisions of District Courts in six other

circuits. The petition for writ of certiorari should be granted in the interests of uniform and orderly procedure in patent litigation and in the interests of resolving, once and for all, the confusion arising from the application by lower Federal Courts of squarely conflicting interpretations of Section 1404(a), Title 28 U. S. C. A.

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OCTOBER TERM, 1957

No. 447

Ex Parte JOHN F. BLASKI, PETER S. PEDERSEN, M-P-H MANUFACTURING CORPORATION, INC., PETER S. PEDERSEN, JR., EDWARD MARTIN, and PETER S. PEDERSEN, Co-Partners, Doing Business as Central Farm Equipment Company.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR R. P. HOWELL, JR. AND LIFETIME METAL BUILDING COMPANY, IN OPPOSITION

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In the

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OCTOBER TERM, 1957

No. 447

Ex Parte JOHN F. BLASKI, PETER S. PEDERSEN, M-P-H MANUFACTURING CORPORATION, INC., PETER S. PEDERSEN, JR., EDWARD MARTIN, and PETER S. PEDERSEN, Co-Partners, Doing Business as Central Farm Equipment Company.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR R. P. HOWELL, JR. AND LIFETIME METAL BUILDING COMPANY, IN OPPOSITION

R. P. Howell, Jr. and Lifetime Metal Building Company, defendants in the patent infringement suit in the District Court wherein the order for change of venue complained about by petitioners was granted, oppose the petition for the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on June 14, 1957.

JURISDICTION

None of the grounds on which petitioners attempt to invoke jurisdiction of this Court is sufficient because:

(1) There is no conflict between the decision of the Court of Appeals for the Fifth Circuit in this case and the decisions of this Court cited by petitioners.

(2) There is no conflict between the decision of the Court of Appeals for the Fifth Circuit in this case and the decision of the Court of Appeals for the Ninth Circuit cited by petitioners, that is, *Shapiro v. Bonanza Hotel Co. (C. C. A. 9, 1950), 185 F. 2d 777, 780.* In the *Shapiro* case the Court of Appeals for the Ninth Circuit simply held that *Title 28, U. S. C. A., Section 1404,* did not permit a *plaintiff* to cause an action to be transferred *over the defendant's objection* to a forum where jurisdiction over the person of the defendant could not have been obtained without defendant's voluntary appearance.

(3) Any conflict between the decision of the Court of Appeals for the Fifth Circuit in this case and the decisions of District Courts in other Circuits is not sufficient grounds to invoke the jurisdiction of this Court. Other decisions of District Courts (not cited by petitioners) are in support of the decision of the Court of Appeals for the Fifth Circuit.

QUESTION PRESENTED

Petitioners incorrectly state the nature of the question which they undertake to present to this Court by assuming that the patent infringement action in this case could not have been brought in the District to which it was transferred. They overlook defendants' waiver of their privilege of objecting to the venue in that District to which the action was transferred. More accurately stated, the question which petitioners undertake to present herein is:

> Would the District Court have the *power* under *Title 28, U. S. C. A. Section 1404(a)*, to transfer the case to another district upon defendants' motion and defendants' agreement to appear in the transferee district and waive their personal privilege as to venue in the transferee district.

STATUTES INVOLVED

This case also involves, in addition to the statutes set out in the petition for certiorari, the statute pertaining to jurisdiction of actions arising under statutes relating to patents, namely:

> "Title 28, U. S. C. A.
>
> "Sec. 1338. Patents, copyrights, trade-marks, and unfair competition
>
> "(a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, copyrights and trademarks. Such jurisdiction shall be exclusive of the courts of the states in patent and copyright cases."

STATEMENT OF THE CASE

The following portion of petitioners' statement of the case is inaccurate, argumentative, and improperly included in the statement of the case and constitutes an insupportable conclusion:

> "Hence, it will be seen that venue was proper in the Northern District of Texas, and would not have been proper in the Northern District of Illinois under Title 28, U. S. C. A., Sec. 1400(b)."

By way of opposition to the petition for certiorari, it is submitted that venue would have been proper in the Northern District of Illinois under *Title 28, U. S. C. A., Sections 1338(a) and 1400(b)*, because defendants specifically waived their privilege to object to such venue. The record in the court below includes defendants' motion for change of venue which contains the following specific waiver:

> "(j) As a part of this motion defendants waive their right to object to venue being properly had in the said United States District Court for the Northern District of Illinois, Eastern Division, * * *."

REASONS FOR NOT GRANTING THE WRIT

1. The claimed conflict with decisions of this Court does not exist.

Ex Parte Collett, 337 U. S. 55, merely held that the trial court correctly transferred an action upon defendants' motion from Illinois to Kentucky.

Pope v. Atlantic Coast Line Railroad Co., 345 U. S. 379, held that Section 1404(a) of the Judicial Code did

not devitalize the holding in *Miles v. Illinois Central Railroad Co., 315 U. S. 698*, which, in turn, held that Section 6 of the Federal Employers' Liability Act displaced the traditional "power of a State Court to enjoin its citizens, on the ground of oppressiveness * * * from suing * * * in the State Court of another state * * *."

Fourco Glass Co. v. Transmirra Products Corp., 353 U. S. 222, merely held that a patent infringement suit was properly dismissed for lack of venue upon defendant's motion.

The decision of the court below is not contrary to the provisions of *Sections 1400(b) and 1404(a), Title 28, U. S. C. A.*

This is a patent infringement action. *Section 1338, Title 28, U. S. C. A.*, grants to any United States District Court original jurisdiction of such action. *Section 1400(b), Title 28, U. S. C. A.*, confers a personal privilege to the defendant in a patent infringement action to be sued only in the judicial district where he resides or has committed acts of infringement or has a regular and established place of business. That privilege is personal to the defendant and may be waived.

Admittedly, the provisions of *Section 1400(b)* control the venue privilege granted to defendants in patent infringement actions and the general venue statute which creates a venue privilege in defendants in general cases is not applicable. But both the patent infringement venue statute and

the general venue statute confer personal privileges upon defendants which may be waived.

This Court has held in *General Electric Co. v. Marvel Rare Metals Co., 287 U. S. 430*, that the venue statute pertaining to patent infringement suits simply "* * * confers upon defendants in patent cases a privilege in respect of the places in which suits may be maintained against them. And that privilege may be waived. *Lee v. Chesapeake & Ohio Ry. Co., 260 U. S. 653; Gulf Smokeless Coal Co. v. Sutton, Steele & Steele, 35 F. 2d 433, 438.*"

Similarly, this Court held in *Lee v. Chesapeake & Ohio Ry. Co., 260 U. S. 653*, that the statute specifying proper venue in diversity cases does not "limit the general jurisdiction of the District Court or withdraw any suit therefrom but merely confers a personal privilege on the defendant, which he may assert, or may waive, at his election, and does waive if, when sued in some other district, he enters an appearance without claiming his privilege."

In *Gulf Smokeless Coal Co. v. Sutton, Steele & Steele, 35 F. 2d 433*, Circuit Judge Parker, speaking for the Fourth Circuit, held that the patent venue statute confers a personal privilege upon the defendant which he may waive:

> "* * * It is true that the statute requires that suit for the infringement of letters patent shall be brought in the district of which defendant is a resident, or has committed acts of infringement and has a regular and established place of business. Judicial Code, Sec. 48, 28 U. S. C. A., Sec. 109; W. S. Tyler Co. v. Ludlow-Saylor Wire Co., 236 U. S. 723, 35 S. Ct. 458, 59 L. Ed. 808; Winterbottom v. Casey (D. C.), 283 F. 518.

> * * * This statutory provision, however, does not affect the jurisdiction of the court, which is conferred by section 24(7) of the Judicial Code, 28 U. S. C. A., Sec. 41(7). Its effect is to confer a privilege personal to the defendant, which he may waive. He waives it if he does not, prior to entering a general appearance in the action, take objection in the proper form to the jurisdiction of the court over him. Sandusky Foundry & Machine Co. v. Delavaud (D. C.), 251 F. 631; Victor Talking Machine Co. v. Brunswick-Balke-Collender Co. (D. C.), 279 F. 758; U. S. Expansion Bolt Co. v. H. G. Kroncke Hardware Co. (D. C.), 216 F. 186; Thomson-Houston Electric Co. v. Electrose Mfg. Co. (C. C.), 155 F. 543; In re Moore, 209 U. S. 490, 501, et seq., 28 S. Ct. 585, 52 L. Ed. 904, 14 Ann. Cas. 1164; Thames & Mersey Marine Ins. Co. v. U. S., 237 U. S. 19, 35 S. Ct. 496, 59 L. Ed. 821, Ann. Cas. 1915D, 1087." (P. 438.)

A similar holding is found in *Detroit Motor Appliance Co. v. Taylor, et al., (D. C., E. D. Ill., 1933), 4 F. Supp. 529.*

2. Petitioners have misconstrued the holding of the Court of Appeals for the Ninth Circuit in *Shapiro v. Bonanza Hotel Co., 185 F. 2d 777*, which is not applicable and is not in point, and is not in conflict with the decision of the court below. The District Court in Nevada denied *plaintiff's motion for a change of venue* on the ground of witnesses' convenience. The defendants did not consent to the change of venue, but objected to the change of venue and pointed out that they were not amenable to process in the District to which the plaintiffs sought to transfer venue. That is the exact opposite of the instant case, where the *defendants* moved to transfer and specifically waived their right to object to jurisdiction and venue in the transferee District.

The decision of the Court of Appeals for the Fifth Circuit in this case cites several decisions of Circuit Courts in support of the rule that transfer of the case under Section 1404(a), Title 28, U. S. C. A., is permitted upon the motion or with the consent of the defendants even though they could not have been served with process of the transferee court. *Paramount Pictures, Inc. v. Rodney, 3 Cir. 1951, 186 F. 2d 111, cert. den. 340 U. S. 953, 71 S. Ct. 572, 95 L. Ed. 687; Anthony v. Kaufman, 2d Cir. 1951, 193 F. 2d 85, cert. den. 342 U. S. 955, 72 S. Ct. 629, 96 L. Ed. 710; In re Josephson, 1 Cir. 1954, 218 F. 2d 174; Torres v. Walsh, 2nd Cir. 1955, 221 F. 2d 319.*

In addition, we cite the following recent decisions of District Courts supporting the decision of the Court of Appeals for the Fifth Circuit in this case:

a) *Rhodes v. Barnett (D. C., S. D. N. Y. 1953), 117 F. Supp. 312,* holding, in a tort action commenced in New York by citizens of South Carolina against a Delaware corporation which was doing business in New York, that the corporation could waive its statutory right to insist upon venue in New York and could properly move for a transfer to South Carolina under the provisions of Section 1404(a):

> "In resisting transfer to the District Court in South Carolina plaintiffs maintain that such forum is one where venue cannot be had for this suit. In making this motion defendant has explicitly waived the statutory venue requirement, as it may properly do. Consequently plaintiffs' principal objection to transfer vanishes." Citing

Anthony v. RKO Radio Pictures, D. C., 103 F. Supp. 56, affirmed 2 Cir., sub. nom.; Anthony v. Kaufman, 2 Cir., 193 F. 2d 85, certiorari denied, 342 U. S. 955, 72 S. Ct. 629, 96 L. Ed. 710; Paramount Pictures v. Rodney, 3 Cir., 186 F. 2d 111.

b) *Hill v. Upper Mississippi Towing Corp. (D. C., Minn. 1956), 141 F. Supp. 692:*

"A motion for change of venue presupposes two districts in which there is proper venue, and in which there is or may be jurisdiction of the defendant. This is the implication of the words 'might have been brought' contained in Sec. 1404(a).

"The first issue is: Could the action have been brought in the Western District of Tennessee within the meaning of Sec. 1404(a)? The answer, in my view, is yes.

"It may be wise at the outset to note the final sentence of the Jones Act, 46 U. S. C. A., sec. 688:

> "'* * * Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.'

"The word 'jurisdiction' as used here means 'venue.' See Panama Railroad Co. v. Johnson, 264 U. S. 375, 44 S. Ct. 391, 68 L. Ed. 748. In that case the Court held that the Jones Act was not intended to impose a jurisdictional requirement on actions brought under that Act; such actions are subject only to the general jurisdictional provisions applicable to district courts, now contained in Secs. 1331 and 1332 of the Judicial Code, 28 U. S. C. A. See 264 U. S. at pages 384-385, 44 S. Ct. at pages 392-393.

"The defendant corporation in this case has its principal office in Minneapolis, Minnesota, and venue has been properly laid in this district. But the venue requirement of the Jones Act does not dictate the only forum in which the action may be tried. Venue provisions merely confer upon the defendant a personal privilege which may be waived. Panama Railroad Co. v. Johnson, supra. By moving for a change of venue, the defendant has consented to make a general appearance to contest the action on its merits in Memphis and has necessarily waived any objections to venue and jurisdiction. This consent by defendant qualifies the Western District of Tennessee as a place where the action '* * * might have been brought' within the meaning of 28 U. S. C. A., Sec. 1404(a). The cases clearly so hold. Paramount Pictures v. Rodney, 3 Cir., 186 F. 2d 111, 114; Anthony v. Kaufman, 2 Cir., 193 F. 2d 85; Ferguson v. Ford Motor Co., D. C. S. D. N. Y., 89 F. Supp. 45, appeal dismissed, sub nom. Ford Motor Co. v. Ryan, 2 Cir., 182 F. 2d 329, certiorari denied 340 U. S. 851, 71 S. Ct. 79, 95 L. Ed. 624, and Glasfloss Corp. v. Owens-Corning Fiberglass Corp., D. C. S. D. N. Y., 90 F. Supp. 967."

In short, the petitioners are saying to this Court that venue statutes provide for jurisdiction, whereas the rule is well settled that venue statutes provide a personal privilege which may be waived by defendants. In the instant case the action "might have been brought" in the transferee district because *Section 1338(a) of Title 28, U. S. C. A.*, gave such district jurisdiction of the action, and venue was proper by reason of defendants' waiver of their venue privilege.

Accordingly, the District Court in the instant case, having found that it was for the convenience of the parties and witnesses and in the interest of justice to do so, properly transferred the action to the district in which plaintiffs reside, and such transfer was permitted by *Section 1404(a) of Title 28, U. S. C. A.*

CONCLUSION

The decision of the Court of Appeals for the Fifth Circuit in this case is entirely correct. The grounds upon which petitioners seek certiorari herein are not well founded. The petition should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 447

JOHN F. BLASKI, PETER S. PEDERSEN, M-P-H MANUFACTURING CORPORATION, INC., PETER S. PEDERSEN, JR., EDWARD MARTIN, and PETER S. PEDERSEN, CO-PARTNERS DOING BUSINESS AS CENTRAL FARM EQUIPMENT COMPANY,

Petitioners,

vs.

HONORABLE T. WHITFIELD DAVIDSON,

Respondent.

PETITION FOR REHEARING.

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vs.

HONORABLE T. WHITFIELD DAVIDSON,

Respondent.

PETITION FOR REHEARING.

To the Honorable Justices of the Supreme Court of the United States:

This is a petition for rehearing of the Court's decision of November 12, 1957, denying petitioners' Petition for Certiorari.

Rehearing is requested because of the additional substantial grounds not heretofore set forth, namely, that:

(1) The decision of the Court below is in direct conflict with a decision of the Court of Appeals for the Seventh Circuit concerning a matter of great public importance, namely, the meaning and interpretation of Sec. 1404(a), Title 28, U. S. C. A.; and

(2) If the decision of the Court below is not in conflict with the applicable decisions of this Court, as contended in the Petition for Certiorari (pp. 2, 7-12), then, it has decided an important question of federal law which has not been, but should be, settled by this Court, and on which there is widespread conflict by this Court, and on which there is widespread conflict in the federal judicial system, as specifically recognized by the Court below in its opinion (Appendix to Petition for Certiorari, pp. 3a and 4a).

Petitioners' attorneys certify to the Court that this petition is presented in good faith and not for purposes of delay, and that it is restricted to the aforementioned substantial grounds available to petitioners although not previously presented.

I.

The Decision of the Court Below Is in Direct Conflict With a Decision of the Court of Appeals for the Seventh Circuit Concerning a Matter of Great Public Importance.

Section 1404(a), Title 28, U. S. C. A., provides as follows:

"'For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division *where it might have been brought.*'"*

In its decision in the case of *Chicago, R. I. & P. R. Co. v. Igoe*, 212 F. 2d 378, the Court of Appeals for the Seventh Circuit, in ruling on the power of a District Court to transfer a cause from the Northern District of Illinois to the Northern District of Iowa, under the above set forth statute, stated as follows, at page 379:

"Whether to transfer a cause under this section rests in the sound discretion of the trial court. Also, *this section presupposes two jurisdictions in which venue may be laid.*"

*All emphasis added.

The *only* jurisdiction in which venue may be laid in a patent suit is controlled solely by Sec. 1400(b), Title 28, U. S. C. A. (*Fourco Glass Company* v. *Transmirra Products Corporation*, 353 U. S. 222, 1 L. Ed. 786, 789). It provides that such an action may be brought *only* in the judicial district:

(1) "Where the defendant resides, *or*

(2) "Where the defendant has committed acts of infringement *and* has a regular and established place of business."

The defendants reside in Texas. They neither have a place of business, nor, so far as is known, have they committed acts of infringement in Illinois.

In spite of this, the Fifth Circuit Court of Appeals below has ruled in this case that, under Sec. 1404(a), Title 28 U. S. C. A., even though the plaintiffs object, the District Court for the Northern District of Texas (where venue is properly laid), has the power to transfer this cause to the Northern District of Illinois (where venue *cannot* properly be laid). This is in *direct conflict* to the above set forth ruling of the Seventh Circuit Court of Appeals that this section of the statute "presupposes *two* jurisdictions *in which venue may be laid.*"

It is well established that the right to select the forum, granted by statute to plaintiffs in federal actions, is a *substantial* right (*Boyd* v. *Grand Trunk Western Railroad Company*, 338 U. S. 263, 266, 94 L. Ed. 55). One of these rights, of course, is the right to choose a forum having venue in which an early trial may be had. In the present instance, the case was set for trial on May 31, 1957 in the Northern District of Texas. It is now being transferred, over plaintiff's objection, to the Northern District of Illinois where, it is respectfully submitted, the Court may take judicial notice it is unlikely to be heard for two, or even three, years.

The meaning of Sec. 1404(a), Title 28 U. S. C. A. is of importance not only in this case. It is of major importance in the administration of the patent laws. The rights of plaintiffs under the statute should not be governed by different rules in different circuits, as they are now. It is respectfully submitted that this Court should resolve this conflict on this important question.

II.

If the Decision of the Court Below Is Not in Conflict With the Applicable Decisions of This Court, Then It Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

If the decision of the Court below is not in conflict with the applicable decisions of this Court, as contended in the Petition for Certiorari (pp. 2, 7-12) then it has decided an important question of federal law which has not been, but should be, settled by this Court, and on which there is widespread conflict in the federal judicial system.

The question of federal law involved herein is of great importance not only because it directly involves the substantial right of a plaintiff to select its forum (*Boyd v. Grand Trunk Western Railroad Company*, 338 U. S. 263, 266, *supra*), but also because it is a question of great importance to the conduct of litigation in the federal judicial system.

The conflict of decisions with respect to this question is so widespread as to be almost chaotic. Even the Court of Appeals below, in its opinion (Appendix to Petition for Certiorari, p. 3a) expressly recognized that courts in six of our eleven Judicial Circuits held (contrary to its decision) that, even though a defendant moves for a transfer, a district court does not have the power, under Sec. 1404(a), Title 28 U. S. C. A., to grant the motion where

the defendants are not subject to service in the transferee district. One of those six decisions which are admittedly in conflict with the decision of the Court below is the decision of a present Justice of this Court (Justice Whittaker), when he was sitting as a District Court Judge (*General Electric Co.* v. *Central Transit Warehouse Co.*, D. C. Mo., 127 F. Supp. 817). In addition, the rule in the Seventh Circuit (*Chicago R. I. & P. R. Co.* v. *Igoe*, 212 F. 2d 378, 379, *supra*) is in conformity with the decisions of the aforementioned courts in the six Judicial Circuits, and is in conflict with the decision of the Court below.

Under the present conditions the answer to the question of transfer involved herein depends upon which Judicial Circuit is interpreting Sec. 1404(a), Title 28 U. S. C. A. It is a question on which there has been much judicial controversy, as is specifically recognized in the opinion of the Court below (Appendix to Petition for Certiorori, p. 3a). It is an important, substantial question on which there should be no confusion or conflict, and it is respectfully submitted that it is a question which should be settled by this Court.

The extent of the existing conflict demonstrates the major importance of the question presented by this petition in the administration of the laws in the federal judicial system. The federal courts are in hopeless conflict on the question of where an action may properly be transferred under Sec. 1404(a), Title 28 U. S. C. A. An authoritative ruling on the question by this Court is plainly in the public interest, and is required to insure an orderly administration of justice.

Conclusion.

For the reasons stated, it is submitted that this petition for rehearing is well founded in fact and in law and should be granted.

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